

## It is my opinion that Resolution No. 416 of 2018 suffers from several legal impediments, and is invalid as passed.

In brief, the resolution, which resolves to give Mr. William Riccaldo a paid leave of absence from County service is, in my opinion, invalid because:

- Under the circumstances, the paid leave of absence embodied in the Resolution is a gift of public funds barred by the New York State Constitution, Article VIII, Section 1;
- The County Legislature does not have the power, under either NYS County Law § 207 or General Municipal Law § 92 to grant a paid leave of absence to an individual in the manner it did here; and
- Under the circumstances of this matter, the County Legislature is barred by the separation of powers embodied in the County Charter, from legislating in a manner that interferes with the actions of the executive branch of government by directing the day to day activities of the administration.

Furthermore,

- the arrangement appears to violate NYS Civil Service Law § 209-a (a/k/a the Triborough amendment to the Taylor Law), because it: (a) is an end-around the expressly stated terms of the existing agreement to which the County and the CSEA are bound (i.e. that a single employee be limited to 10 years of “release time”), and; (b) is evidence of a private negotiation of a contractual benefit for an single person without submitting the matter to collective bargaining through the appropriate union representatives;
- it gives specific direction to act to an officer employed in the executive branch of government, which is beyond the power of the Legislature; and
- the quasi-contractual contingencies of the legislation, including the requirement that the CSEA will, in the absence of a contractual obligation, pay the County certain sums, and that the Legislature guarantees it will renew this Legislation until Mr. Riccaldo no longer holds an elected union position, have no substance or are invalid. There is no agreed means for the CSEA to make the payments, and this Legislature may not bind itself or future Legislatures/governments through contract. The guarantee is only memorializing of present intentions with no force of law to ensure the term is followed.

### *Background*

In June 2008, the County Legislature ratified a Memorandum of Agreement (MOA), later incorporated that MOA into the CSEA collective bargaining agreement as Article XX, paragraph 20. In substance, that MOA provided that if any employee of the County was elected as an officer of the CSEA, that County employee could choose to take “release time” from County employment to attend to union duties for up to ten years. During that release time, according to the contract, the CSEA would compensate the County for all expenses related to the employment of the officer on release time.

In January 2008, Mr. William Riccaldo was elected as an officer of the CSEA. To the best of my understanding, Mr. Riccaldo was, at the time, a provisional employee in the Department of General Services. In January 2008, he was granted administrative leave. However, in June 2008, upon the ratification of the MOA, he opted to take the release time described in the MOA.

In 2018, the maximum period for release time permitted by the MOA expired.<sup>1</sup> At the time of the expiration, the amount the County was paying to Mr. Riccaldo, in salary and benefits, was approximately \$120,000 per year.

The County, by a letter from the County Attorney to Mr. Riccaldo, written on behalf of the appointing authority, the Director of Facilities, requested that Mr. Riccaldo return to work. Mr. Riccaldo’s counsel called the County Attorney in response to the letter, objecting to the demand and indicating that it was within the power of the County to grant a leave of absence under the NYS County Law § 207 and NYS General Municipal Law § 92. Following the call, the Director of Facilities placed Mr. Riccaldo on unpaid leave of absence. Mr. Riccaldo remains on unpaid leave of absence from his provisional position at the time this opinion is written.

On July 10, 2018, the County Legislature passed the Resolution that is the subject of this opinion. In substance that Resolution, attached, resolves to grant Mr. Riccaldo one year of paid leave of absence, which the County Legislature pledges to renew yearly until Mr. Riccaldo no longer requires it, and directs the Commissioner of Personnel to take all necessary steps to enact the resolution. It also sets forth three conditions, described as contingencies: first, that Mr. Riccaldo forfeit all vacation, sick time and other similar accruals; second, that the CSEA must repay the County for the expenses of Mr. Riccaldo’s employment; and third, that Mr. Riccaldo give 45 days notice before returning to work for the County.

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<sup>1</sup> It is a matter of debatable contract interpretation as to whether the 10-year period expired in January 2018, ten years from the effective date of the retroactive term of the MOA, or June 2018, ten years from the date of its ratification. However, the difference is insignificant as the County acted upon the expiration after the later of the two dates, removing any doubt as to the condition of expiration.

### *Analysis*

In reviewing the Resolution, several points bear analysis.

First, determining if the grant of a paid leave of absence under the present circumstances a gift of public money.

Second, determining the scope of the County Legislature's power to grant a paid leave of absence to a particular individual, on a particular occasion, which individual is in a unique circumstance, versus creating a policy or ratifying a contract term applicable as a rule applying to a class of persons.

Third, determining if the County Legislature has the power, in this case, to act in an administrative capacity to manage the day to day employment conditions of an individual in a department, or to direct a specific act of a Commissioner in the Executive Branch.

I conclude that, in my opinion, based upon the facts and authorities available to me, that:

- Under the circumstances, the paid leave of absence embodied in the Resolution is a gift of public funds barred by the New York State Constitution, Article VIII, Section 1;
- The County Legislature does not have the power, under either NYS County Law § 207 or General Municipal Law § 92 to grant a paid leave of absence in the manner it did here; and
- Under the circumstances of this matter, the County Legislature is barred by the separation of powers embodied in the County Charter, from legislating in a manner that interferes with the actions of the executive branch of government by directing the day to day activities of the administration.

In addition to these salient points, the nature of the "contingencies" of the Resolution, will be discussed to determine the mechanics of enacting its provisions; and the matter of the guarantees and promises in other portions of the Resolution shall be discussed.

#### *A. The grant of the paid leave of absence is a gift of public funds*

The Constitution of the State of New York, Article VIII, Section 1, prohibits gifts of public funds to private individuals. The grant of a paid leave of absence, not incidental to a condition of employment is, in my opinion, a prohibited gift of public funds.

The New York State Court of Appeals summed it up well in *Boyd v Collins*, 11 NY2d 228, 234 [1962], stating,

If school board members can avoid embarrassment by paying a year's salary [during which time the teacher was not expected to report to work] to get rid of a teacher, then a board can pay such salary for 5 years or for life. Where would board members ever get such a power?

Also, “[a]n employee who has not worked has not delivered consideration for the payment of wages.” *Golomb v Bd. of Educ.*, 106 Misc 2d 264, 266 [Sup Ct, Kings County 1980].

As such, it is my opinion that the paid leave of absence to Mr. Riccaldo embodied in the Resolution is also prohibited.

It is uncontroverted to me that, since at least 2008, William Riccaldo has not performed any actual work for the County of Rockland. There is no indication to me that Mr. Riccaldo intends to work for the County at any time in the future. Also, the Resolution fails to require any service by Mr. Riccaldo to the County in return for the paid leave of absence and neither the Resolution nor any other information known to me expresses that there is any benefit to the County government granted in exchange for the paid leave.

The New York State Constitution, Article VIII, Section 1, states that,

The money of the state shall not be given or loaned to or in aid of  
any private corporation or association, or private undertaking . . .

This “gifts and loans clause”, as it is often referred to, prohibits the County from making payments in the absence of any return from the person or entity being paid.

“The courts have recognized that the State and its municipalities in granting pensions, vacations or military leave are not conferring gifts upon their employees, but that essentially the promised rewards are conditions of employment -- a form of compensation withheld or deferred until the completion of continued and faithful service. *Teachers Asso., Cent. High Sch. Dist. v Bd. of Educ.*, 34 AD2d 351, 353-354 [2d Dept 1970].<sup>2</sup>

As summed up by the Southern District of New York in *Blatt v Fashion Inst. of Tech.*, 1989 US Dist LEXIS 9185, at \*12,

The relevant question is whether the payment constitutes a gift of public funds, and if consideration other than the rendering of services was furnished by the employee, no violation of Article VIII, § 1 occurs.

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<sup>2</sup> The courts have treated matters concerning sick leave, vacation and other types of leave and benefits of employment uniformly. Any given case cited in this memorandum, may refer to benefits other than leave with pay, but the theory behind the analysis remains the same.

The New York State Court of Appeals has framed it similarly, holding in *Board of Educ., Union Free School Dist. No. 3, Town of Huntington v. Associated Teachers of Huntington*, 30 N Y 2d 122, 127,

The validity of a provision found in a collective agreement negotiated by a public employer turns upon whether it constitutes a term or condition of employment.

See also, *Syracuse Teachers Asso. v Bd. of Educ.*, 42 AD2d 73, 75 [4th Dept 1973].

In this case, there does not appear to be any consideration whatsoever for the grant of paid leave of absence. The County government receives no work from Mr. Riccaldo in return for the paid leave of absence. I am informed that for the past ten years, Mr. Riccaldo has dedicated 100% of his time to pursuits other than serving the County government. While acting as an elected union official may be a beneficial service to many, it is not employment by, or service rendered to, the County government.

Thus, the present proposal by the Legislature, to pay Mr. Riccaldo to go do something else other than serve the County government, for an indefinite period of time, does not offer consideration to the County, nor does it constitute a term or condition of employment.

It is unquestioned that the County is permitted to pay people for time they do not work. That includes time for sick leave, vacation, education, and other similar time off, including paid and unpaid leaves of absence. See NYS County Law § 207 and GML § 92.

As noted above, such benefits must be earned as a part of the terms and conditions of employment. Simply because this is a union matter does not change that rule. The Taylor Law does not authorize a public board to give away public funds -- an act forbidden by section 1 of article VIII of the New York State Constitution. While it is a duty of a government to employ people and to pay them reasonable compensation through salary and benefits, it must be earned.

Paying a public officer or employee for services not rendered is an unconstitutional gift of public moneys. In the matter of *Boyd v Collins*, 11 NY2d 228, 234 [1962]<sup>3</sup> in order to avoid the necessities of proper disciplinary procedures, a school board gave a teacher a one year leave of absence. The Court found the practice to be a prohibited gift of public money, stating

If school board members can avoid embarrassment by paying a year's salary to get rid of a teacher, then a board can pay such salary for 5 years or for life. Where would board members ever get such a power?

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<sup>3</sup> *Boyd v. Collins*, 11 N.Y.2d 228, 228 N.Y.S.2d 228 (1962), overruled on other grounds, *Abramovich v. Board of Education*, 46 N.Y.2d 450, 414 N.Y.S.2d 109, cert. denied, 444 U.S. 845 (1979)

See also, *Hansell v Long Beach*, 61 AD2d 84, 89 [2d Dept 1978], (a contract provision which was beyond the powers of a board to agree to “offends the constitutional prohibition against gifts of public moneys (NY Const, art VIII, § 1)”).

With sick or vacation time, or similar accruals, it is expected that the vast majority of an employee’s time would be dedicated to work for the County. What is different here is that none of Mr. Riccaldo’s time will be dedicated to the County. General Municipal Law § 92 envisions granting leave time where an employee is elected as an officer of a union, and occasional leave would be expected, where most of the time was being spent on County work. However, it flies in the face of the gifts and loans clause to pay an employee to work full time for a private corporation like the CSEA.

An employee who has not worked has not delivered consideration for the payment of wages. *Golomb v Bd. of Educ.*, 106 Misc 2d 264, 266 [Sup Ct, Kings County 1980].

Why, one asks, is this arrangement even sought? Why does the CSEA not simply pay Mr. Riccaldo directly, rather than run his salary and benefits through the proxy of County government?

The answer was given by Legislative Counsel at the Budget & Finance Committee Meeting of July 29, 2018. The reason given was, so that Mr. Riccaldo, who does not work for the County or the State, can get the retirement and pension benefits offered to County and State employees. This includes both the pension based upon his salary, and the County’s generous health insurance benefit, offering equivalent health insurance to all employees who retire from the County after 5 years of service.

Both the past arrangement through the CBA and the proposed Resolution both hinge on the CSEA paying the entirety of the County’s out-of-pocket costs for having Mr. Riccaldo on the payroll. It may be rationalized that the County is receiving consideration for this arrangement through the receipt of the money from the union, required both under the former contract and under the proposed resolution. It is questionable whether “breaking even” is a benefit to the County.<sup>4</sup>

Even if unwittingly and through a misconception of the circumstances, a government exercises a power which it does not possess, that of paying out money to a person for which the employee rendered no service, it is a direct violation of the constitutional ban against gifts of public moneys. *Moses v Bd. of Educ.*, 59 Misc 2d 318, 320 [Sup Ct, Kings County 1969].

Moreover, as discussed above, the County and the State will have payment obligations which will run long past the time Mr. Riccaldo is “employed” by the County, which

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<sup>4</sup> Upon this analysis, I have doubts as to whether or not the prior, contractual arrangement was itself legal. Even matters enshrined in a collective bargaining agreement can be invalid under the gifts and loans clause. See *Boyd v Collins*, 11 NY2d 228, 234 [1962].

obligations for pension and health insurance will not be reimbursed and which will not have been earned by Mr. Riccaldo by service to the County or the State.

No case has ever gone on to analyze such a situation. It would be surprising to find that a court would favor granting the generous retirement benefits provided by the County and State, at the expense of taxpayers, to a person who for over a decade has reaped the benefit of accruing time into the County and State retirement system, without actually working for the County or the State.

B. *Under the present circumstances, the County Legislature does not possess the authority to grant the benefit of paid leave of absence to a single employee*

With respect to the validity of the legislation, I believe that the Legislature has gone beyond the authority granted to it in granting this unlimited paid leave to an individual employee.

As set forth by the State Comptroller in Opinion 60-659, General Municipal Law § 92 does not provide a blanket authorization for a board to grant leave benefits to individuals, it may only do so as part of a broadly applicable policy.

In the underlying facts of Opinion 60-659, a town board sought to pass a resolution to authorize paid sick leave for a particular per diem employee.

In construing that statute [GML § 92] this Department has expressed the opinion that a city may, by resolution, adopt a reasonable plan of sick leave. In that opinion, the view was expressed that the plan must apply uniformly and not to permit discrimination within the various classes of employees to which it might be applicable.

This opinion follows the thought in *Coates v New York*, 49 AD2d 565, 566 [2d Dept 1975], in which the Appellate Division, Second Department recognized that under Section 92, New York City's Legislature had the power to enact code provisions pursuant to which cash payments in certain instances can be made to employees as a part of a collective bargaining agreement. (citing *Teachers Asso., Cent. High Sch. Dist. v Bd. of Educ.*, 34 AD2d 351 [2d Dept 1970])

There is no case interpretation of Section 92 in which the benefit of leave is permitted to be given to a single employee in the absence of a policy applicable to a whole class, by a provision of a collective bargaining agreement, statute or other lawful means. See also *Syracuse Teachers Asso. v Bd. of Educ.*, 42 AD2d 73, 76 [4th Dept 1973], in which the court recognized the validity of leave provisions for an entire class of employees in a bargaining unit. In that case it was deemed that the benefit was not a raid on the public finances for a particular employee because of the give and take of negotiations (consideration for the benefit, as discussed above) and it applied to the whole bargaining unit.

Because of the negotiation and breadth of the benefit, it was found to be within the competence of the union and the government to negotiate and include such term in the contract. *Syracuse Teachers Asso. v Bd. of Educ.*, 42 AD2d 73, 76 [4th Dept 1973].

However, unlike *Coates, Teachers Assoc.* and *Syracuse Teachers*, but more like the employee in Comptroller opinion number 60-659, Mr. Riccaldo is singled out for the benefit conferred pursuant to GML § 92 and the similarly worded County Law § 207. As with that employee, it is my opinion that the County Legislature may not authorize paid leave of absence for a particular employee in the absence of a pre-existing policy permitting such a leave. Which policy itself must make the leave a benefit incidental to the service to the County government, not a benefit in the place of service to the government.

C. *Under the circumstances, the County Legislature has intruded upon the authority of the County Executive and violated the separation of powers embodied in the County Charter*

The power to supervise, direct and control the administration of all departments of the county government is reserved to the County Executive. RCCL § C3.02.

The Legislature is the policy and appropriating branch of government. RCCL §C2.01. In addition, by County Law § 215, the County Legislature is the branch of County government responsible for the “general care and control of the corporate real and personal property of the county.”

The question has arisen, which branch of County government has authority to grant a leave of absence to Mr. Riccaldo and to determine whether or not such the leave is paid. The answer to that question is not expressly stated under the County Charter or any other applicable law.

#### 1. *Powers of the County Legislature*

The County Legislature has the exclusive power to legislate, appropriate and determine policy for the County government. See Rockland County Charter § 2.01 (preamble). With respect to personnel matters in particular, the Legislature is granted the powers:

- To exercise all powers of local legislation in relation to enacting, amending or rescinding local laws, legalizing acts or resolutions, which shall all be binding upon the County Executive, the Legislature and all department heads.; RCC § C2.01(c)
- To create and abolish positions and to fix the compensation of all officers and employees paid from county funds . . . RCC § C2.01(f), and



- To approve any extensions of appointments to temporary positions with an annualized salary of \$75,000 . . . RCC § 2.01(m).

Of course, *within* the Legislative branch of government, the Legislature is the day to day administrator and the appointing authority for its employees. Mr. Riccaldo however, is an employee in the executive branch of government, whose appointing authority is the head of the Division of Facilities in the Department of General Services (which at this time, has no Commissioner).

## 2. *Powers of the County Executive and within the executive branch*

The Rockland County Executive in particular, has a suite of powers and responsibilities related to the management and administration of the County government. He is the chief administrative officer of the County (RCC § C3.02(preamble) and (s)); he supervises and directs the internal organization of the departments whose heads he appoints (RCC § C3.02(a)); he is the chief budget officer (RCC § C3.02(b)); appoints temporary employees (RCC § C3.02(e)); appoints personnel in his office (RCC § C3.02(h)); sends officers and employees to conferences (RCC § C3.02(i)); authorizes extensions of sick leaves (RCC § C3.02(k)); he is the chief administrative officer of the County (RCC § C3.02(s)); and he is responsible for the exercise of all executive and administrative powers in relation to any and all functions of County government not otherwise specified in the Charter Law and has all necessary incidental powers to perform and exercise any of the duties and functions described in the Charter or otherwise lawfully designated to him.

Included in those other powers, he has the responsibility to develop plans and has the power to remedy budget imbalances. The County's Budget Controls (Laws of Rockland County (LRC) § 5-46(B)) provide that,

The County Executive shall maintain control, at all times, over the expenditures of each administrative unit, officer, employee and the financial activity of the County in accordance with the provisions of the Charter and this code. [Note: which would include, following all valid local laws and resolutions, including budget resolutions, of the County Legislature, see RCCL § C3.02(x)].

Implicit in those responsibilities is the power within the office of the County Executive to meet them. See RCCL § C3.02(x) ("he or she shall have and be responsible for the exercise of all executive and administrative powers in relation to any and all functions of county government not otherwise specified in the Charter Law and have all necessary incidental powers to perform and exercise any of the duties and functions specified herein or lawfully designated to him or her.").

I am advised that presently the appointing authority for the Division Facilities in the Department of general Services, is the Director of Facilities, Mr. Robert Gruffi. In the absence of a Commissioner of General Services, Mr. Gruffi is under the direct supervision of the County Executive.

Rockland County Civil Service Rules, Rule XIX deals with Leave of Absence, stating:

RULE XIX\*

LEAVE OF ABSENCE

1. A leave of absence without pay may be granted by the appointing authority in conformance with the rules and regulations established by the appropriate legislative body or with the provisions of an appropriate labor agreement, provided, however, that this section shall not be construed to authorize any employment beyond the time at which it would otherwise terminate by operation of law, rule, or regulation.
2. A leave of absence without pay, not to exceed four years, shall be granted by an appointing officer to an employee who is a veteran of the Armed Forces of the United States, providing such a leave of absence is for the purpose of taking courses under the educational benefits provided for in Title 38, United States Code or under a New York State Board of Regents War Service Scholarship, Education Law, Section 614. An employee taking such a leave shall be reinstated to his/her position, provided he/she makes application for such reinstatement within sixty days after the termination of his/her courses of study.

Upon this body of law and regulation, one may fairly reach the conclusion that the Legislature stepped into the realm of the Executive in granting a leave of absence to a particular individual. It is the Legislature's role to provide the rules and policies for a leave of absence, but not to administer them for particular employees other than its own.

Similarly, the Legislature is not permitted to direct the Commissioner of Personnel, as it does in this proposed Resolution. The Commissioner of Personnel is an employee of the Executive Branch of government, who by Charter, is appointed by, and reports to the County Executive.

*D. Other issues related to the effect of the proposed Resolution*

In addition to the matters discussed above, I also note that although the Legislature represents that CSEA commits to compensating the County, there is no current agreement supporting that contention. At this point, any money that CSEA would pay the County would be a gift to the County, not a contractual payment.

Also, the resolved clause that purports to bind future legislators to the effect that "the Legislature commits to pass successive resolutions to accommodate William Riccaldo's term(s) of office, on an annual basis so long as the terms of the second Resolved clause herein continue" is illusory. This resolution can be changed by any future resolution or

local law of the Legislature that seeks to do so. It is, at best, a memorialization of the sentiments of these Legislators at the present moment, with no binding effect.

Also, NYS Labor Law 209-a prohibits the County from refusing to continue all the terms of an expired agreement until a new agreement is negotiated. In this case the contract provides that Mr. Riccaldo's term is limited to a 10-year maximum. Doing an "end around", by artificially increasing that 10-year term by means of a tailored resolution to pay Mr. Riccaldo for time not worked may be a violation of the Section 209-a, a part of the Triborough amendment to the Taylor Law. The union too has a duty it may not breach, the duty of fair representation to public employees it represents. Civil Service Law § 209-a(2)(c).

In this case, this special deal for Mr. Riccaldo, outside the purview of the collective bargaining agreement (which bars his continued release time), may be a violation of the Civil Service Law. Cf. *Civil Serv. Emples. Ass'n, Local 1000 v City of Troy*, 223 A.D.2d 825, 636 N.Y.S.2d 455, [3d Dep't 1996] (city respondents attempted to circumvent proper collective bargaining procedures, in violation of CLS Civ S § 209-a, by negotiating directly with city employees rather than with their appointed representatives).